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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOEL HODGELL, an individual,
Plaintiff,

vs.

MEMOLINK INC., a New York corporation,
TRIFECTA ADVERTISING, LLC, a Colorado
limited liability company, MINDSHARE
DESIGN, INC., a California corporation, and
TOPICA, INC., a California corporation,

Defendants.

NO. C02-2183Z
NOTICE OF REMOVAL

TO: The Clerk of the Court;
AND TO: Plaintiff, JOEL HODGELL;
AND TO: D. MICHAEL TOMKINS and THE LAW OFFICES OF D. MICHAEL
TOMKINS, P.S., Attorneys for Plaintiff;
AND TO: The Clerk of the Superior Court of the State of Washington, in the County of King
at Seattle.

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that Defendants
MEMOLINK, INC., TRIFECTA ADVERTISING, LLC and MINDSHARE DESIGN, INC.
hereby remove the above-captioned action from Superior Court of the State of Washington to the
United States District Court for the Western District of Washington.

NOTICE OF REMOVAL - 1

ORIGINAL

NEWMAN & NEWMAN, ATTORNEYS AT LAW, LLP
1001 Fourth Avenue Plaza, Suite 2560
Seattle, Washington 98154
phone: (206) 624-6334
fax: (206) 624-6348

GROUND FOR REMOVAL

2 This court has original jurisdiction of this action because of the diversity of citizenship of
3 the parties. The matter in controversy exceeds the sum of seventy-five thousand dollars
4 (\$75,000.00), exclusive of interest and costs. The Plaintiff is a resident of the State of
5 Washington. Defendant Memolink, Inc. is a New York Corporation and does not have a place of
6 business in the State of Washington. Defendant Trifecta Advertising, LLC is a Colorado limited
7 liability company and does not have a place of business in the State of Washington. Defendants
8 Mindshare Design, Inc. and Topica, Inc. are California corporations and do not have places of
9 business in the State of Washington. No defendant is a citizen of any state in which Plaintiff is a
10 citizen. This notice of removal will be filed within 30 days after receipt of the complaint by the
11 Defendants. Accordingly, the Defendants are entitled to remove this case to the United States
12 District Court for the Western District of Washington.

13 A copy of all process, pleadings, and orders served upon the defendants is attached
14 hereto.

15 DATED this 22nd day of October 2002

Respectfully Submitted,

**NEWMAN & NEWMAN,
ATTORNEYS AT LAW, LLP**

By:

Derek A. Newman, WSBA No. 26967
Roger Townsend, WSBA No. 25525

Attorneys for Defendants Memolink, Inc., Trifecta Advertising, LLC and Mindshare Design, Inc.

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In King County Superior Court Clerk's Office

SEP 26 2002

**Cashier Section
Superior Court Clerk**

[GLENN S. HALL]

**SUPERIOR COURT OF WASHINGTON
IN AND FOR KING COUNTY**

JOEL HODGELL, an individual,
Plaintiff

) Cause No.:
) **02-2-27842-6SEA**
) COMPLAINT FOR DAMAGES AND
) RELIEF UNDER THE UNFAIR
) BUSINESS PRACTICES-CONSUMER
) PROTECTION ACT AND THE
) UNSOLICITED ELECTRONIC MAIL ACT
)
)
)
)
)

Defendants

COMES NOW, plaintiff, Joel Hodgell, by and through his attorney D. Michael Tomkins and brings this action against defendants named herein. The plaintiff alleges the following on information and belief:

I. JURISDICTION AND VENUE

1.1. This complaint is filed and proceedings are instituted under the provisions of RCW 19.86, the Unfair Business Practices Consumer Protection Act, RCW 19.190, the Washington State Commercial Electronic Mail Act, and under the common law torts of trespass to chattels, harassment, and theft of services (RCW 4.04.010).

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1.2. Pursuant to RCW 19.86.090 and RCW 19.190, this court has proper subject and personal jurisdiction and proper venue. Pursuant to RCW 19.86.160 the defendants have submitted themselves to the personal jurisdiction of the courts of this state within the meaning of RCW 4.28.180 and RCW 4.28.185.

1.3. The violations alleged herein have been and are being committed in whole or in part in King County, in the State of Washington by defendants named herein.

II. PLAINTIFF and DEFENDANTS

2.1. Plaintiff, Joel Hodgell, is a resident of the State of Washington and of the County of King, an adult over the age of eighteen years, is located at 12712 Lake City Way NE 3, Seattle, WA 98125.

2.2. Defendant Memolink, Inc. is an active for-profit New York corporation, with their principal business location in Lakewood, Colorado, conducting business in Washington State through Commercial e-mail solicitations and Internet websites, and has control of the content, transmission, activities and practices related to those internet transmissions and websites.

2.3. Defendant Trifecta Advertising LLC is an active, for profit Colorado Limited Liability Company, with their principal business location in Lakewood, Colorado, conducting business in Washington State through Commercial e-mail solicitations and Internet websites, and has control of the content, transmission, activities and practices related to those internet transmissions and websites

2.4 Defendant Mindshare Design, Inc. is an active, for-profit California Corporation with their principal business location in San Francisco, California, conducting business in Washington State through Commercial e-mail solicitations and

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1 Internet websites, and has control of the content, transmission, activities and practices
2 related to those internet transmissions and websites.

3 2.5. Defendant Topica, Inc. is an active, for-profit California Corporation with
4 their principal business location in San Francisco, California, conducting business in
5 Washington State through Commercial e-mail solicitations and Internet websites, and
6 has control of the content, transmission, activities and practices related to those internet
7 transmissions and websites.

8 III. NATURE OF TRADE OR COMMERCE

9 3.1. Defendants, initiated the transmission, and/or conspired with unknown
10 associates to initiate the transmission, and/or assisted the transmission (RCW
11 19.190.010(1), to plaintiff, of many dozens of commercial electronic mail messages
12 (within the meaning of RCW 19.190.010(2)), also known as "spam", that promoted
13 websites hosted by the defendants' unknown associates or by the defendants
14 themselves.

15 3.2. Said messages are not "an electronic mail message to which an
16 interactive computer service provider has attached an advertisement in exchange for
17 free use of an electronic mail account, when the sender has agreed to such an
18 arrangement" (RCW 19.190.010(2)). The defendants have a long history of spamming
19 as found at SPEWS, "Spam Prevention Early Warning System", at
20 <http://www.spews.org/html/S809.html> and as found at the Usenet groups
21 news.admin.net-abuse.email and news.admin.net-abuse.sightings.

22 3.3. Pursuant to RCW 19.190.020(2) the defendants knew or had reason to
23 know that they sent unsolicited commercial electronic mail to Washington State

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1 residents. All of the plaintiff's email addresses that were spammed by the defendants
2 are registered at <http://registry.waisp.org> and the plaintiff's residency status information
3 for his email addresses are available upon request from the registrant of the Internet
4 domain names found in his email addresses and from the plaintiff directly.

5 3.4. The defendants are in competition with others in the State of Washington
6 engaged in similar business.

7 IV. FIRST CAUSE OF ACTION – VIOLATIONS OF RCW 19.190

8 4.1. Plaintiff realleges Paragraphs 3.1 through 3.4 and incorporate them herein
9 as if set forth in full.

10 4.2. Electronic mail messages sent via the Internet contain a header, which
11 tells the recipient the source of the original message, as well as any points of
12 transmission on the message's path to the eventual recipient. A typical header will
13 show the path of computers that sent the electronic mail message to the ultimate
14 recipient. The specific computers are identified by a series of computer and domain
15 names, and Internet protocol address numbers. Often there are several computers
16 involved in transmitting the message to its final destination. By examining the names
17 and numbers which identify each computer along the transmission path, it is possible to
18 determine who originally sent the message, and which Internet service providers
19 transmitted it to its ultimate recipient.

20 4.3. Defendant Memolink-Trifecta used defendant Mindshare Design's
21 Postmaster General (PMG) and Topica's Email Publisher email list management
22 services to send their unsolicited bulk emails ("spam") to the plaintiff. The true origin of
23 dozens of Memolink's spams were from some unknown Internet location, but were
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finally sent through Mindshare Design's Postmaster General servers. Many dozens of the Memolink-Trifecta spams said "Trifecta01@ofr.mb00.net", "Just For You <Trifecta01.10@reply.mb00.net>", "Your Opportunity . . ." <Trifecta01.14@reply.mb00.net>, "Secret Admirer <Trifecta01.17@reply.mb00.net>" and "Message sent by Mindshare Design customer with ID "Trifecta01"". Unless a recipient is familiar with an Internet WHOIS search they would not know mb00.net belongs to defendant Mindshare Design. In dozens of these spams, there was no way for the recipient to know the true identity and origin of the "Mindshare Design customer with ID "Trifecta01", from the email header or their spam's content.

When the plaintiff called defendant Mindshare Design in April 2002, they refused to release the true identity of "Trifecta01". From the header information it was impossible to tell if "Trifecta01" was another company or defendant Mindshare Design itself. One of Mindshare Design's selling points to their clients is the ability for their customers to make their spams look like they appear from wherever they want them to originate from, or to just use a useless misleading "data sink", "/dev/null/" default "userID@mb00.net" email address, which ignores and discards all email replies sent to it. Defendants Mindshare Design and Topica have flawed business models because they allow their clients to hide their true identity by totally anonymizing their identity while Mindshare Design and Topica send out their clients spam and provide substantial additional aid by helping their clients clean their bogus "opt-in" spam lists of email addresses that were falsely and deceptively put on those spam lists to begin with. Accordingly, all defendants misrepresented the transmission path of their email

1 messages by misrepresenting and obscuring their true point of origin, in several ways,
2 and thus, clearly violated RCW 19.190.020(1)(a).

2 4.4. Defendant Memolink-Trifecta used the third party Internet domains names
3 "mb00.net" and "topica.com" and "email-publisher.com" to send their unsolicited spams
4 to the plaintiff. Memolink-Trifecta does not own "mb00.net", "topica.com" and "email-
5 publisher.com". The owner of "mb00.net" is defendant Mindshare Design, and Topica
6 Inc. owns "topica.com" and "email-publisher.com" who both have made it very clear in
7 their Acceptable Use Policies and legal statements they do not give their customers
8 permission to use their domains or services for sending unsolicited bulk emails.
9 Mindshare Design and Topica Inc. also require all of their customers to keep detailed
10 records as to where, when and how any email addresses were obtained by true "opt-in"
11 means by their customers. Defendant Memolink-Trifecta has no such records for how
12 they obtained the plaintiff's email address they spammed hundreds of times. Plaintiff
13 never subscribed to defendants' spam lists. Defendant Memolink-Trifecta obtained the
14 plaintiff's email address through some unknown means. Defendant Mindshare Design
15 warned their customers at their mindsharedesign.com website to not use third party
16 sources for obtaining email addresses. Clearly, defendant Memolink-Trifecta used third
17 party Internet domain names "mb00.net", "topica.com" and "email-publisher.com" in
18 their spams, without their owner's permission, and thus violated RCW 19.190.020(1)(a).

21 Defendants Mindshare Design Inc. and Topica Inc. have failed to enforce their
22 own Acceptable Use Policies and thus have "assisted" the spamming done by
23 defendant Memolink-Trifecta within the meaning of RCW 19.190.010(1) and (4).

25 4.5. On 19 April 2002, defendant Memolink-Trifecta started spamming from
26 their own domain name of justforyounewsletter.com, which is registered to defendant

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 Trifecta Advertising. The plaintiff was then finally able to learn defendant Memolink-
 1 Trifecta was indeed responsible for all of the "Trifecta01" spams sent from the mb00.net
 2 Internet domain, and defendant Andrew Wolf verified this too on 19 April 2002. In at
 3 least eight of the defendant Memolink-Trifecta's spams, they sent them using their
 4 domain name justforyounewsletter.com, which should have assigned IP numbers of
 5 204.99.158.4 or 204.99.158.5, but were really sent from untraceable, unassigned and
 6 totally obscured private network IP numbers, such as 172.16.1.134. Clearly, the
 7 defendants did misrepresent or obscure any information in identifying the point of origin
 8 or the transmission path of a commercial electronic mail message, and clearly violated
 9 RCW 19.190.020(1)(a).

10 4.6. The defendants also used third party Internet domain name Hotmail.com,
 11 owned by Microsoft Inc., without their permission in the "to" field, which is part of the
 12 transmission path. Hotmail.com is supported by paid advertisements, and not by the
 13 unpaid, unrequested, unpermitted, misleading and parasitic commercial email
 14 messages sent by the defendants. Clearly, the defendants' spamming practices are an
 15 unfair method of competition and unfair or deceptive act or practice in the conduct of
 16 any trade or commerce, and such practices have been declared unlawful by the
 17 Washington State legislature in RCW 19.190 and RCW 19.86.

18 4.7. Many of the defendants' spams had false or misleading subject lines in
 19 them, such as: "It's too late?" and "Pinch me" and "Never Pay Another Phone Bill
 20 Again!" It is a violation of RCW 19.190.020(1)(b) to send a commercial electronic mail
 21 message that contains false or misleading information in the subject line, and clearly
 22 defendant Memolink-Trifecta has violated RCW 19.190.020(1)(b).

23 4.8. It is a violation of RCW 19.190.020(1)(a)(b) and 19.190.030(1)(a)(b) to
 24 initiate the transmission, conspire with another to initiate the transmission, or assist the
 25 transmission, of a commercial electronic mail message from a computer located in

Washington or to an electronic mail address that the sender knows, or has reason to know, is held by a Washington resident that uses a third party's internet domain name without permission of the third party, or otherwise misrepresents or obscures any information in identifying the point of origin or the transmission path of a commercial electronic mail message, and/or contains false or misleading information in the subject line. Pursuant to RCW 19.190.020(1)(a)(b), each Count in this First Cause of Action is a separate and distinct violation of RCW 19.190, and pursuant to RCW 19.190.030(1)(a)(b), (2), and (3) constitutes a separate and distinct violation of the Consumer Protection Act, RCW 19.86.

V. SECOND CAUSE OF ACTION – VIOLATIONS OF RCW 19.86

5.1. Plaintiff realleges Paragraphs 3.1 through 4.8 and incorporates them herein as if set forth in full.

5.2. Each Count in the First Cause of Action also constitutes a separate and distinct act of an unfair method of competition and unfair or deceptive act or practice in the conduct of any trade or commerce, has been declared unlawful, and violates RCW 19.86 (RCW 19.86.020, et seq.), the Washington Consumer Protection Act.

VI. THIRD CAUSE OF ACTION – COMMON LAW TORTS OF TRESPASS TO CHATTELS, HARASSMENT, AND THEFT OF SERVICES

6.1 Plaintiff realleges Paragraph 3.1 through 5.2 above, and incorporates them herein as if set forth in full.

6.2. Each Count in of the First and Second Causes of Action also constitute separate and distinct acts of trespass to chattels onto the personal property of plaintiff.

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6.3. Each Count in of the First and Second Causes of Action after the defendants were told by the plaintiff to not spam him any more, and/or were first served with this lawsuit, also constitute separate and distinct acts of harassment.

6.4. Each Count in of the First and Second Causes of Action also constitute separate and distinct acts of theft of services, services that the plaintiff paid and pays for.

6.5. As a proximate result of defendants' conduct in each and every Count in the First, Second and Third Causes of Action, plaintiff has experienced loss of use, loss of value, and additional work and expenses relating to his computer equipment and Internet service which he paid and pays for.

VII. PRAYER FOR RELIEF

WHEREFORE, plaintiff, JOEL HODGELL prays for relief as follows:

7.1. That the Court adjudge and decree that defendants have engaged in the conduct complained of herein.

7.2. That the Court adjudge and decree that the conduct complained of constitutes violations of the Commercial Electronic Mail Act, Chapter 19.190 RCW, and pursuant to RCW 19.190.030(2) and (3) constitute separate and distinct *per-se* violations of the Consumer Protection Act, RCW 19.86.

7.3. That the Court adjudge and decree that the conduct complained of constitutes unfair or deceptive acts or practices and unfair methods of competition in violation of the Consumer Protection Act Chapter 19.86 RCW.

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1 7.4. That the Court adjudge and decree that the conduct complained of
2 constitutes separate and distinct acts of trespass to chattels, harassment, and theft of
3 services.

4 7.5. That the Court assess damages, pursuant to RCW 19.190.040(1), of five
5 hundred dollars (\$500.00) per violation against defendants for each and every, separate
6 and distinct violation of RCW 19.190, and for additional violations while this civil action
7 is pending, to be paid by the defendants to the plaintiff.

8 7.6. That the Court assess treble punitive damages, pursuant to RCW 19.86.090,
9 for each and every separate and distinct violation of RCW 19.190 (RCW 19.190.040(1))
10 and for additional violations while this civil action is pending, to be paid by the defendants
11 to the plaintiff.

12 7.7. That the Court assess civil penalties pursuant to RCW 19.86.140, of two
13 thousand dollars (USD\$2,000), for each and every, separate and distinct violation of RCW
14 19.86.020 caused by the conduct complained of herein, and for each additional violation
15 while this civil action is pending, to be paid by the defendants to the plaintiff.

16 7.8. That the Court assess an award of damages for each count, for each and
17 every, separate and distinct act of trespass to chattels, harassment, and theft of
18 services violation, and for each additional violation while this civil action is pending, to
19 be paid by the defendants to the plaintiff.

20 7.9. That the Court assess treble punitive damages, pursuant to RCW 19.86.090,
21 for each and every separate and distinct violation found in 7.8.

22 7.10. That the Court issue a permanent injunction enjoining and restraining
23 defendants and their representatives, successors, assigns, officers, agents, servants,
24

employees, and all other persons acting or claiming to act for, on behalf of, or in active
1 concert or participation with defendants from continuing or engaging in the unlawful
2 conduct complained of herein.

3 7.11. That the Court make such orders pursuant to RCW 19.86.080 to provide that
4 plaintiff have and recover from the defendants the cost of this action, including reasonable
5 attorney's fees.

7 7.12. That the Court order such other relief as it may deem just and proper to fully
8 and effectively dissipate the effects of the conduct complained of herein, or which may
9 otherwise seem proper to the Court.

Dated: September 25, 2002.

~~D. MICHAEL TOMKINS, WSBA #4979
Attorney for Plaintiff~~

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